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Supreme Court of the United States

OCTOBER TERM, 1957

No. 1030

J. VERNAL JACKSON, Warden of Clinton Prison, and THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

UNITED STATES OF AMERICA, *ex rel.* WILLIAM WADE,
Relator-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

May 26, 1958

LOUIS J. LEFKOWITZ,
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Supreme Court of the United States

October Term, 1957

No.

J. VERNAL JACKSON, Warden of Clinton Prison, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

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UNITED STATES OF AMERICA, *ex rel.* WILLIAM WADE,

Relator-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of J. Vernal Jackson, Warden of Clinton Prison, and The People of the State of New York respectfully shows to the Court:

1. Petitioner Jackson is the Warden of the prison in which the relator Wade has been confined pursuant to a judgment of a court of competent jurisdiction of the State

of New York, the judgment being that he be confined for the duration of his natural life; and the petitioner The People of the State of New York constitutes one of the sovereign States of the Union.

2. The decision of the United States Court of Appeals for the Second Circuit is dated May 19, 1958, and has not yet been reported. A copy of the opinion is annexed as Exhibit A. The decision of the United States District Court for the Northern District of New York (per Hon. James T. Foley, D. J.), which was reversed by the Court of Appeals, is reported in 144 F. Supp. 458. A copy of the opinion is annexed as Exhibit B.

Grounds Of Jurisdiction Of This Court.

3. The jurisdiction of this Court is invoked upon these grounds:

(a) The decree of the United States Court of Appeals, in a habeas corpus proceeding, has adjudged void this conviction of the relator after the conviction had been affirmed by the highest Court of the State (see *People* v. *Wade*, 291 N. Y. 574, rearg. den. 292 N. Y. 577) and after this Court had denied certiorari (*Wade* v. *New York*, 320 U. S. 789, reh. den. 320 U. S. 815); and it has forbidden the further detention of the relator, after 17 years of his sentence had been served, thereby bringing about an improper interference with the due and orderly administration of criminal justice in the State of New York, and a disregard of applicable decisions in this Court, *e. g.*, *Brown* v. *Allen*, 344 U. S. 443, 458, and *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152.

(b) The decree sought to be reviewed has permitted to be reopened the question of the voluntariness of the relator's confession, and has held it involuntary, although on precisely the same record the highest Court of the State had (implicitly, by affirming the judgment of conviction without opinion) held the confession not to be vitiated by involuntariness—this Court denying certiorari—so that the course of criminal justice is interfered with; the gravity of the interference being accentuated by the lapse of 17 years between the date of the crime charged and the decree sought to be reviewed, making a new trial impossible.

Date Of Decree.

4. The judgment or decree sought to be reviewed was dated May 19, 1958 and was entered May 20, 1958. The mandate issued forthwith.

Statute Conferring Jurisdiction.

5. Review in this Court is authorized by 28 U. S. Code, § 1254, subd. 1.

Questions For Review.

6. The questions presented for review are:

(a) Whether a federal court has the power in a habeas corpus proceeding to conduct an inquiry de novo into the voluntariness *vel non* of a confession, and to adjudge it involuntary, after precisely the same issue had been previously passed upon on the same record and decided the opposite way by the State court of last resort (this Court denying certiorari).

(b) Whether when the voluntariness of a confession depends on the weighing of conflicting testimony a federal court has the right (1) to refuse to be bound by the decision of the State court of last resort that it was voluntary and (2) to annul the conviction, particularly where precisely the same record was before the federal court as had previously been before the State court.

(c) Whether when seventeen years have elapsed after the commission of the crime and the making of the confession, so that a new trial cannot be had, these factors should not have required the federal court to refrain from upsetting the conviction on collateral attack.

Pertinent State Laws.

7. The statutes which are of most pertinence on this application are found in N. Y. Code of Criminal Procedure §§ 165 and 395, and read as follows:

> "§ 165. Defendant, upon arrest, to be taken before magistrate
>
> The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

> "§ 395. Confession of defendant, when evidence, and its effect
>
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

The validity of neither is under challenge here.

Statement Of Case.

8. A concise statement of the case is as follows: On April 13, 1941, three convicts escaped from Sing Sing Prison, in Ossining, N. Y., killing an unarmed prison guard in order to make their getaway. Arms had been smuggled into the prison yard in a package tied under a milk truck. A man named Kiernan, friend of relator and of one of the escapees, had sought the aid of relator-respondent, who had cooperated in two respects: (1) he had trailed the milk truck, and learned its routes, so that it became possible to select one of its less conspicuous stopping places and there affix contraband to its substructure; (2) he had stolen a car and arrived with it in Ossining at the moment of the escape though an earlier encounter between the escapees and the police, during which one escapee and one policeman died, caused the surviving escapees to flee by different means instead. Wade and Kiernan (who was a friend of relator of long standing and who had visited one of the prisoners in Sing Sing), parked the stolen car (containing guns and ammunition) near the railroad station where the escapees could find it, started walking uphill to the town proper, and then entered a bar upon the appearance of a police radio car. About this time they heard shots fired. They left the bar, re-entered another and then hailed a taxi. They were arrested before they could enter it. The burden of Wade's petition is that he was held incommunicado for more than 20 hours, beaten repeatedly, questioned for hours on end, kept without food and otherwise maltreated, until he signed a paper confessing his role in the crime. He asserts that he was denied the right to exhibit his bloodstained clothes to the jury. His confession was held involuntary and his conviction void.

Basis Of Federal Jurisdiction.

9. The relator applied to a federal court for a writ of habeas corpus because he said he had been convicted without due process of law, contrary to the Fourteenth Amendment.

Reasons For Allowance Of Writ.

10. The writ of certiorari should be allowed because the decree of the United States Court of Appeals permits a judgment of conviction to be collaterally attacked on habeas corpus and upon a record replete with factual issues all of which had been raised at the trial and in the State appellate courts, and decided adversely to the relator's contentions, certiorari being denied by this Court. To tolerate such a reopening of closed issues interferes gravely with the orderly administration of criminal justice in New York State.

This Court's attention is specially invited to the heavy reliance of the Court below upon inferences and presumptions in reaching the conclusion of involuntariness of the relator's confession. Facts are called "undisputed" where an ensuing paragraph shows that only a series of inferences furnished the basis for such characterization of the facts. Clearly whether such inferences should have been made was a question for the jury; and the appellate reviews which the relator has already had should have been accepted by the Court below as proof that the jury in rejecting such inferences had not acted with caprice. In short, the Court below gave less respect to the jury's verdict than it was required to give under such cases as *Stein v. New York*, 346 U. S. 156, 182 (1953). The prior denial of certiorari in Wade's case shows that there has already occurred "the application of constitutional standards of fundamental fairness under the Fourteenth Amendment"

as those words were used in *Thomas* v. *Arizona*, 356 U. S. (May 19, 1958).

In this context we submit that the following language of the United States District Court is in such perfect accord with the pronouncements of this Court that its decree of dismissal should have been allowed to stand (144 F. Supp., at p. 461):

> "In my judgment, the trial of these four defendants contained all the contradictions of evidence and inference that could be developed on this crucial issue. The trial judge was painstaking in all his efforts and allowed the most thorough presentation and cross examination to the defense. * * * It is impossible for me to tip over this jury verdict and judgment of conviction that has been reviewed by five judges of the Appellate Division of New York, seven judges of the Court of Appeals of New York, and certiorari denied by unanimous vote of the United States Supreme Court when the matter was a current one. * * *"

11. It should not be forgotten that the relator has already availed himself of the right to apply to this Court for a direct review of the affirmance of his conviction by the highest Court of the State. But this Court having denied certiorari, it is submitted that respect for the requirements of due process does not justify permitting the prisoner to relitigate the same issues after a lapse of 15 years, and attack on habeas corpus a judgment which this Court by denying certiorari has seemingly regarded as immune from attack.

We use the words "relitigate the same issues" advisedly. As will be perceived from the transcript of the point headings and bold face material in Wade's brief in the New York Court of Appeals which are copied out in Appendix C, *infra*, every argument against the validity of his conviction raised in the United States Court of Appeals had already been *made and rejected* in the New York Court of

Appeals. The brief in that tribunal had evidently been read by Judge FOLEY, who said (144 F. Supp., at p. 460):

> "Wade was represented by experienced criminal counsel. The presentation of force, violence and threat to his person during his custody and interrogation could not have been more fully developed. * * *"

12. *Malinsky* v. *New York*, 324 U. S. 401, ~~on which the United States Court of Appeals relied~~, was before this Court not on habeas corpus but on a writ of certiorari to the State court of last resort which had affirmed the conviction. It is no precedent for the collateral attack which has been sanctioned in the instant case.

WHEREFORE, petitioners pray that a writ of certiorari may issue directed to the United States Court of Appeals for the Second Circuit commanding the said Court to certify to this Court, pursuant to the usual practice, a transcript of the record herein and of the proceedings upon it, pursuant to which the decree sustaining the writ of habeas corpus herein was issued, so that the said proceedings may be reviewed in this Court and the decree by which petitioners deem themselves aggrieved may be reversed; and your petitioners will ever pray.

Albany, N. Y., May 26, 1958.

J. VERNAL JACKSON, Warden of
Clinton Prison, and

THE PEOPLE OF THE STATE
OF NEW YORK,
Petitioners,

by LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York, and

PAXTON BLAIR,
Solicitor General of the State
of New York,
The Capitol,
Albany 1, N. Y.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 366-367—October Term, 1957.

(Argued April 18, 1958 Decided May 19, 1958.)

Docket Nos. 24380, 24805

UNITED STATES OF AMERICA, *ex rel.* WILLIAM WADE,
Relator-Appellant,

v.

J. VERNAL JACKSON, Warden of Clinton Prison, and THE PEOPLE OF THE STATE OF NEW YORK,
Respondents-Appellees.

Before:

CLARK, LUMBARD and WATERMAN,
Circuit Judges.

Consolidated appeals from two orders of James T. Foley, *Judge*, Northern District of New York, denying on the merits the appellant's two petitions for a writ of habeas corpus, the first petition claiming that his conviction for felony murder in the Westchester County Court, New York, in 1941, was obtained by the use of his involuntary confession given after 23 hours of confinement incommunicado

during which he was subjected to physical abuse. 144 F. Supp. 458. Reversed with instructions to issue the writ forthwith.

HENRY C. ROEMER, JR. and PHILIP C. POTTER, JR., New York, N. Y., *for relator-appellant.*

GEORGE K. BERNSTEIN, Deputy Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Paxton Blair, Solicitor General, Samuel A. Hirshowitz, Assistant Attorney General and Michael Freyberg, Assistant Attorney General, on the brief), *for respondents-appellees.*

LUMBARD, *Circuit Judge:*

The question for decision is whether William Wade's confession, obtained during a detention of 23 hours, was involuntary so that its use by the state in order to convict him for felony murder[1] in the Westchester County Court was in violation of his constitutional rights. Wade was tried as a principal who aided and abetted three inmates of Sing Sing Prison who while they were escaping killed a prison guard.

We find on the admitted facts that Wade's confession was involuntary and thus its use was in violation of due

[1] Felony murder is a homicide committed by one engaged in a felony. As first degree murder it carries a mandatory death sentence unless life imprisonment is recommended by the jury. New York Penal Law §§ 1044(2), 1045, 1045-a. Here the jury recommended life imprisonment for Wade. In New York one who aids and abets is a principal in both the felony and the felony murder. *People* v. *Michalow*, 229 N. Y. 325 (1920), New York Penal Law § 2.

process of law guaranteed by the Fourteenth Amendment, and that without the confession there was insufficient evidence to convict Wade. As Wade's further detention under sentence of life imprisonment is unwarranted we reverse the order of the District Court for the Northern District of New York which denied him the writ of habeas corpus and direct that the writ issue forthwith.

At the trial which resulted in Wade's conviction in June 1941 for felony murder committed on April 14, 1941, he objected at every point to the introduction of his two unsigned question-and-answer statements to the District Attorney. The County Judge denied the motion to exclude and under the New York rule left to the jury the question of whether the confession was voluntary. See 21 U. Chi. L. Rev. 317 (1954). After deliberating for over 28 hours the jury found Wade, two of the convicts and one Edward Kiernan guilty of first degree murder, but in the case of Wade and Kiernan they recommended mercy and life imprisonment.[2]

The Attorney General does not dispute that Wade has exhausted his state remedies as required by 28 U. S. C. §2253. The Appellate Division affirmed Wade's conviction without opinion, 265 App. Div. 867 (2 Dept. 1942) and the Court of Appeals did likewise, 291 N. Y. 574 (1943), reargument denied, 292 N. Y. 577 (1944). It should be noted that at no time has any state court judge set forth the reasons for the unanimous rejection of Wade's claims. The Supreme Court denied certiorari, 320 U. S. 789 (1943), reh.

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[2] The other two defendants, Riordan and McGale were electrocuted after the Court of Appeals had unanimously affirmed their convictions without opinion, 288 N. Y. 544 (1942).

den. 320 U. S. 815 (1944), the petitioner appearing *pro se* in the Supreme Court. On his appeals Wade argued that his confession was involuntary and this claim was the subject of his first petition to the District Court filed on July 20, 1956.

Wade's second petition of July 17, 1957 alleged suppression of evidence by the District Attorney in failing to produce the clothing Wade wore during his detention prior to arraignment and in taking measures to make one of Wade's alibi witnesses unavailable. The suppression of evidence claims were first raised November 1955 by application for *coram nobis* which was denied by the Westchester County Court on March 17, 1956. The Appellate Division denied leave to appeal *in forma pauperis* on April 23, 1956, and certiorari was likewise denied, 352 U. S. 974 (1957). Having done all he could to seek redress in the state courts and in the Supreme Court of the United States, Wade was clearly entitled to a hearing in the federal courts. *United States ex rel. Marcial* v. *Fay*, 247 F. 2d 662 (2 Cir. 1957), *United States ex rel. Smith* v. *Jackson*, 234 F. 2d 742 (2 Cir. 1956).

After Wade filed his first petition in July 1956, Judge Foley ordered the Attorney General and the District Attorney to show cause. They filed affidavits and the record of the trial, the briefs filed in the Court of Appeals and the petitions for certiorari. On these papers and the oral argument of the Attorney General, Judge Foley considered the petition. As the questions at issue were the admitted facts before the trial court and the inferences to be drawn therefrom, it was quite proper for Judge Foley to dispense with a hearing and to make his decision on the basis of the record already made. *Brown* v. *Allen*, 344 U. S. 443, 503 (1953);

Appendix A.

United States ex rel. Caminito v. *Murphy*, 222 F. 2d 698 (2 Cir. 1955), cert. den. 350 U. S. 896. Judge Foley denied the first petition on September 26, 1956, 144 Fed. Supp. 458. By consent that appeal was held in abeyance until the state courts had acted on the *coram nobis* application and until Judge Foley had passed on the questions raised in the second petition of July 17, 1957, which he did on the same day. In his denial of Wade's petitions Judge Foley appears to have rested heavily on the unanimous state court decisions all of which were without opinion. Nevertheless he granted certificates of probable cause which permitted the prosecution of these appeals.

We are mindful that the federal courts should be loath to interfere with the course of criminal justice administered by a state where a serious crime has been committed, here the fatal shooting of a prison guard by three escaping inmates. We are also fully aware of the undesirability of setting aside a seventeen year old jury verdict which, until now, has been unanimously affirmed by the New York appellate courts, both on the original appeal and in subsequent proceedings. *Watts* v. *Indiana*, 338 U. S. 49, 50 (1949).

Notwithstanding whatever weight it may be appropriate to assign to such review as the state courts may have made of such a claimed violation of constitutional rights, it is the duty of the federal courts to make their own independent examination of the record to determine whether on the basis of the undisputed facts there is any merit to the claim. If the undisputed facts disclose that a defendant's confession was involuntary, and it appears that without this evidence he would not have been convicted, his conviction and detention have been obtained in violation of the due process of law promised by the Fourteenth Amendment. In

such cases the writ of habeas corpus should issue. *Leyra* v. *Denno*, 347 U. S. 556 (1954); *United States ex rel. Caminito v. Murphy, supra.* See also *Stein* v. *New York*, 346 U. S. 156 (1953). Doubtless it was word of the *Leyra* and *Caminito* decisions which dealt with facts strikingly similar to those at bar, which stirred the petitioner to knock on the federal court doors fifteen years after his conviction. Of course, such a lapse of time does not bar the petition. In *Palmer* v. *Ashe*, 342 U. S. 134 (1951), the Supreme Court ordered a hearing for a habeas corpus petition which attacked a conviction 18 years old. In *Caminito, supra*, the writ was granted 14 years after the conviction. We have held that a delay of 13 years between conviction and the petition should not prevent the issuance of the writ, *Sarini v. Jackson*, 250 F. 2d 349 (2 Cir. 1957).

Thus it is our duty to examine the trial record of 2,688 pages in three printed volumes of testimony and exhibits considered by the jury in Westchester County at the trial which lasted from May 26 to June 27, 1941, for such undisputed facts as bear upon the 23 hour period from Wade's arrest at 3 A. M. on April 14, 1941, to his arraignment at 2 A. M. on April 15, and the circumstances surrounding the two question-and-answer statements which were stenographically recorded at the State Police Barracks at Hawthorne commencing at 10:13 P. M. of April 14 and later at 1:03 A. M. of April 15.

Wade's claim of coercion was first made when he testified at his trial and is repeated in his petition. In summary his claim is that commencing shortly after he was brought to the Ossining police headquarters he was repeatedly struck and kicked by officers and troopers of the State Police and this treatment continued after his removal to the

Barracks. He charges that he was continually knocked down and pulled up by his hair and later by a rope tied around his wrists until he bled profusely, that he was punched in the face and kicked in the groin, that he had no sleep at any time, and had no food until after his second statement when he was given a glass of milk and some water after 22 hours of confinement. As a result of this treatment Wade asserts that he could resist no longer and he finally gave the answers which were suggested to him and that his incriminating answers were not the truth.

Just before 3 A. M. in the early morning of April 14, 1941, Wade and Kiernan were arrested by an Ossining police officer, Vincent Kelly, just as they were about to take a taxi at Langton's taxi office on May Street to go to White Plains. Within the half hour preceding, Riordan, McGale and Waters, serving time at Sing Sing Prison, had made a miraculous escape after many months of planning. In the prison hospital McGale and Waters shot and killed a prison guard, John Hartye, just after he had made his 2:30 A. M. report. All three then made their way to the basement, opened numerous doors by means of keys secretly made, and went through a 314 foot long tunnel which carried various pipes to a power house across the New York Central tracks. The tunnel opened 30 feet above the railroad tracks and they slid down a rope and ran along the tracks to the street. There they unexpectedly encountered an Ossining police car and in an exchange of gunfire a policeman was killed[3] and Waters was either killed or took his own life.

[3] The trial judge excluded any evidence concerning or any reference to the fact that the gun battle between the three convicts and the Ossining police resulted in the immediate killing of an Ossining policeman. However, that fact is pertinent on this appeal as it bears upon the attitude of the police and the state troopers.

Appendix A.

It was immediately apparent to the police, and it was amply proven at the trial, that the prison break had required not only long and careful planning by the prisoners but outside help to smuggle in the guns and ammunition which the convicts used in their escape. In addition, around 5:30 A. M., three hours after the break, Ossining police found a Plymouth sedan parked under the ramp near the railroad station. In the rear seat were a machine gun and rounds of ammunition The Plymouth turned out to have been stolen from 39th Street and 7th Avenue in New York City where it had been parked at 7:30 P. M. the evening before. When found it bore the license plates of a Pontiac which had been stolen in New York on February 22.

Meanwhile when first questioned after their arrest, Wade and Kiernan stated that they had driven up from New York with two girls, that they had had a fight with them when they got to Ossining and that the girls drove away and left them. Wade gave his true name and address and for identification produced a bill of sale for an automobile. Wade consistently denied any knowledge about the jail break until 8 P. M. on April 14, which was 17 hours after his arrest. The statements obtained by the end of 23 hours of confinement and questioning told quite a different story. In brief Wade finally admitted that he had twice trailed the truck which delivered milk inside the prison so that the guns and ammunition could be secreted and so delivered to Waters, that he had stolen the Plymouth, that he knew about the machine gun, and that he and Kiernan had driven up to Ossining with two other friends, Charlie Bergstrom and Robert Brown,* Wade driving the Plymouth and the

* Bergstrom and Brown were not indicted, and there is no evidence in the record, apart from the confessions, that they had anything to

(Footnote continued on following page)

others in an Oldsmobile. When Wade and Kiernan heard the shooting they changed their plan to leave in the Oldsmobile and tried to take a taxi to White Plains.

After the gun battle with the Ossining police, Riordan and McGale compelled a shad fisherman at gun point to row them across the Hudson River. They finally surrendered about 8 A. M. to Ossining police and state troopers who surrounded them in the woods. Brought back to the Ossining police headquarters handcuffed together, Riordan and McGale were knocked to the ground by a Sing Sing prison guard and struck by an Ossining policeman. Pictures taken by William Stahl, a Daily Mirror photographer, leave no doubt of the reception which was tendered to Riordan and McGale at the headquarters despite the presence of numerous reporters and photographers.[5] While it is not our province to pass on the credibility of the testimony of state troopers and police that Riordan and McGale were not struck or kicked or mistreated at any time thereafter, and that Wade and Kiernan were not mistreated at any time during the long hours they spent in custody prior to arraignment, we must observe that at

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(Footnote continued from preceding page)
do with the escape or the presence of Wade and Kiernan in Ossining. Wade did testify that he knew Charles Burke, also referred to as Bergstrom, and Robert Brown.

[5] The atmosphere at Ossining headquarters was admitted by Arthur W. Mead, Ossining police lieutenant in charge, on cross examination:

"Q. And it was perfectly all right with you to have these prisoners beaten and knocked around, wasn't it? A. Perfectly all right for them to be knocked down, yes, sir.

Q. And beaten? Is that right? It was in accordance with your wishes? A. Not wishes.

Q. But you were satisfied? A. Yes, sir."

the Barracks no non-police or non-prosecution witnesses were present to report what happened.[6]

But the undisputed facts and the inadequate explanations made by the state are sufficient to show that by violence and harassment Wade's statements were finally extracted from him against his will because he could resist no longer and he knew there was no other way to bring an end to his ill treatment. The admitted facts and the inadequate explanations from which we conclude that Wade's confessions were involuntary may be summarized as follows:

1. Although arrested at 3 A. M. on April 14, Wade was not arraigned until about 2:30 A. M. the following day, more than 23 hours later, after he and Kiernan had finally made their statements. Riordan and McGale, who confessed much earlier, had been arraigned at 7 P. M., 7½ hours before Wade and Kiernan.

2. During the 23 hours Wade was not permitted to sleep and he was constantly questioned by numerous state troopers and police.

3. During the 23 hours Wade had no food. He had one glass of milk about 7 P. M. 16 hours after his arrest, and a drink of water during his last statement which commenced at 1:03 A. M. He refused an offer of sandwiches and coffee at 1 P. M. and at 7 P. M. according to Sergeant Hamblin.

4. According to Sergeant Hamblin who was with Wade at the Barracks, Wade did not agree to make a statement until 8 P. M. which was 17 hours after his arrest. According to Major Moniz, attached to the District Attorney's office,

[6] Although photographs were taken at the Barracks, apparently they were for police records and none were produced at trial.

this was after Wade for at least 7 hours had repeatedly denied any complicity to Moniz.

5. Although the District Attorney, at least two of his assistants, more than a dozen officers and troopers of the state police and at least four officers and policemen of the Ossining police department were at the Barracks from some time in the morning, Wade's question-and-answer statement was not started until 10:13 P. M., more than 19 hours after his arrest. So far as the record shows, neither the District Attorney nor his assistants were occupied in questioning any of the prisoners during almost 6 hours before 10:13, although the District Attorney stated in his summation and argued to the jury that he was constantly occupied until Wade finished his second statement sometime after 1 A. M. The District Attorney and some of the officers did go to Louis' restaurant for supper but apparently this did not take much over an hour.

6. George H. Gordon, Jr., the court reporter who took stenographic notes of the examinations, testified that Wade was reluctant and deliberate in his speech and "didn't speak clearly at times." He had to sit next to Wade so that he could hear him better. He said there were times during Wade's examination when he was told not to put down questions and times when there was talk off the record. Wade looked tired and mumbled his words. Gordon could not swear that suggestions had not been made to Wade as to the answers he should give. He testified that after the first statement Wade was taken out and brought back again an hour and a half later to answer further questions starting at 1:03 A. M.

7. When Wade was brought back at 1:03 A. M. to answer further questions put by the District Attorney, he made several statements in contradiction of his earlier answers. These contradictions concerned (1) where the machine gun had been kept, and from whom it had been obtained, (2) that Charlie Bergstrom and Robbie Brown had also driven up from New York with Kiernan in an Oldsmobile, (3) that Charlie Bergstrom was with them instead of "Jimmy Hannon," (4) that the cars in which the four had ridden up were a Plymouth, which Wade drove, and an Oldsmobile instead of a Ford as Wade first stated. Most important of all, Wade finally admitted at the 1 A. M. questioning that he had twice trailed the milk truck, once with Brown and Bergstrom and once with Kiernan and Brown "to see where [they] could find a good spot to put the guns underneath." This admission, wrung from Wade after 22 hours of confinement, was the most vital of all. Without it there was no case of Wade's complicity in the escape as there was no independent evidence whatsoever to support this admission.[7] Wade had made no mention of trailing the truck in his first statement and in fact there is no record of any question put to him about the milk truck prior to 1:03 A. M.

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[7] Of course we can give no weight whatever to Kiernan's confession so far as Wade is concerned. Kiernan, in his confession, extracted at 11:13 P. M., stated that Wade had trailed the truck on one occasion. Kiernan did not testify and the trial judge instructed the jury several times that Kiernan's confession was not admissible against Wade. All the defendants had moved for separate trials which motions the trial judge overruled on the basis of the District Attorney's assertion that all four defendants had confessed and that there was independent proof as to the actual participation of each. *Stein* v. *New York*, *supra*, at pp. 194-196 of 346 U. S., held that there was no constitutional error in admitting confessions of other defendants under instructions that they were to be considered only against the confessing defendant.

Appendix A.

The record contains no explanation of what happened in the hour and a half which Wade spent in the dark room, which the troopers used for photographic work, between his first and second statements; we have nothing to account for this additional damning admission.[8]

8. The District Attorney never produced the suit worn by Wade at the time of his arrest although he had promised to do so on May 28, 1941 at the beginning of the trial while the selection of the jury was still under way. Wade's counsel at that time stated that the clothing was blood-stained. Thus the failure to produce permits the inference that the suit would have been damaging to the state's case.

9. Dr. Edward J. Davis, an interne at the Grasslands Hospital, examined Wade on April 14 at the County Jail and made a written report which stated that Wade had "ecchymotic areas" on his body, described as discolorations produced by hemorrhage beneath the skin which could have been caused by blows.

10. Four weeks later, on May 13, Dr. Henry T. Kelley, representing the state, examined Wade, together with Dr. Abraham Clahr, who represented Wade.[9] Dr. Kelley found a scar an inch and a quarter long on Wade's left thigh, a scar on his left wrist and a scar on the inner surface of his

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[8] Meanwhile Kiernan had been questioned, and when Wade's name was introduced into the questioning he implicated Wade in trailing the milk truck in his answers although Kiernan never mentioned Wade's name himself in this connection.

[9] The delay in having this further examination of Wade is probably accounted for by the fact that his sister did not see him until three and a half weeks after his arrest. Thereafter counsel was retained for Wade and the examination followed.

lower lip. When Wade complained of a penetrating pain in the region of his eighth rib, both doctors confirmed that he had been tested to obviate the possibility of malingering and that it appeared to them that he was not faking about the pain in the rib region. These marks and pains could have been the result of blows inflicted on April 14.

11. Upon Wade's arraignment he was asked whether he waived examination or wanted an adjournment. Wade first said he wanted an adjournment, but when the Assistant District Attorney told him to waive examination Wade did so. Neither at this time nor at any time during his 23 hour confinement was Wade advised of his right to counsel.

12. Two other defendants, who were also kept at the Barracks, likewise showed signs of rough treatment. Dr. Davis testified that when he examined McGale on April 14 he found an abrasion on the lower part of the left leg, crusted blood on the left nostril and a sore jaw. Kiernan was examined on April 15 in the County Jail hospital by Dr. Davis who testified that he found ecchymotic areas on the left eye and on Kiernan's trunk. These were dark blue discolorations. One area in the pit of the stomach was about the size of a baseball. He also found a long laceration on his left shin.

13. No explanation was ever given under oath as to why the prisoners were removed from Ossining to the state police barracks, a twenty minute ride by car, although they had to be brought back to Ossining for arraignment. The District Attorney, who never was sworn as a witness, stated in his summation that this was done on his order. In his opening the District Attorney had asserted that Wade and Kiernan made statements to him freely and voluntarily.

In his summation he stated that the prisoners were taken to the barracks "because the feeling was so high, and we did not want them to stay there." He also stated "If I have given myself to be present at a time that a single hand was laid upon any of the four defendants in any way, shape or manner, then my integrity should be impeached by you." This he followed up later with a statement which is as much unsworn testimony as it is argument:

> "There was never a hand laid on any of those four men after they left Ossining. Sure we talked to them for 21½ hours you say, without sleep. They were tired and we were tired, and I think the facts show what we did, the amount of work we did there during those hours that we spent there. The only thing they are complaining about is that we got the most incriminating statements probably ever presented to a jury."

When the judge overruled objections to this questionable statement, the District Attorney went further and suggested that the black and blue marks testified to by Dr. Davis had been administered to Wade and Kiernan because they must have had a fight with Brown and Bergstrom.[10] Although there was no evidence of this whatsoever, the judge also overruled the objections to this while stating that he recalled no such evidence. On this appeal the Attorney General does not advance the District Attorney's explanation for the black and blue marks, but he suggests instead that they probably may have been received at the Ossining

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[10] Of course this assumed the truth of the confessions in order to argue that they were voluntary because any marks on Wade and Kiernan were administered *before* they were taken into custody. The state adduced no evidence that Wade and Kiernan had been in a fight, or bore any marks when they were arrested at 3 A. M.

police station.[11]. Of course this argument is in some measure in support of Wade's allegations although it shifts the onus from the state police to the Ossining police.

We have referred to the prosecutor's unsworn remarks and his arguments as they constitute the only attempt to explain the admitted facts of the doctors' testimony and reports. In the face of these facts the strategy of the state was tantamount to an admission that it could not fully and honestly meet the claims that Wade and Kiernan had been beaten before their arraignment. By deliberately making an issue of his own integrity in his summation, by cross examining Wade so as to imply that Wade and he had a different recollection as to what had happened, by stating as facts matters concerning which he must have had some knowledge although he did not submit himself to be examined as a witness, the District Attorney, in our opinion, underscored the weakness of the state's position.

Taking a man to the state police barracks, keeping him incommunicado for 23 hours during which he is permitted no sleep, with no food whatsoever, and only two glasses of liquid after many hours, submitting him to constant questioning despite his denials, is not only degrading and uncivilized but it is obviously coercive. This treatment, without convincing explanation of its reasonableness, is sufficient to indicate that the resulting statement was involuntary and that it was given to put an end to what most of us would consider torture.

Such detention of a defendant in the complete and exclusive control of the police without arraignment has been

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[11] Respondent's Brief, p. 14: "Wade testified that he was also assaulted in the Ossining police station, which may well account for the few bruises which Dr. Davis said he found on the man."

denounced by the Supreme Court because it "breeds coerced confessions. It is the root of the evil." *Watts* v. *Indiana*, *supra* at p. 57; 22 Tenn. L. Rev. 1015 (1953). Indeed the New York Criminal Code requires that a defendant be arraigned "without unnecessary delay." New York Code of Criminal Procedure § 165. But failure to arraign without unnecessary delay, even though it constitutes a violation of the state code is only one factor to be considered in the determination of whether a confession is involuntary. *People* v. *Snyder*, 297 N. Y. 81, 92 (1947); *Lisenba* v. *California*, 314 U. S. 219, 235 (1941); *Stroble* v. *California*, 343 U. S. 181 (1952).

The two reasons suggested by the state for the delay in Wade's arraignment are that it was necessary to protect the defendants because of the state of public feeling; and secondly, that it was necessary to allow for a prompt and thorough investigation. The first reason seems specious in the light of the fact that Riordan and McGale had been arraigned.

As to the second reason for delay in arraignment, namely the necessity to conduct a prompt and thorough investigation, all we are deciding here is that the 23 hour delay was far more than was reasonably necessary for such an investigation, especially in view of the fact that the state has made no explanation of how those hours were used to pursue the investigation and why it was necessary to hold Wade for so long.

The Attorney General quite correctly urges that some opportunity for interrogation is essential in order to administer criminal justice. Of course law enforcement officers must be permitted some leeway between the time of arrest

and arraignment where a serious crime has just been committed and inquiry must be made of all those who are nearby and who may have information. This is necessary delay. In this case the fact that a hot pursuit of Riordan and McGale was then under way would contribute to the necessary delay. In addition the presence of Wade and Kiernan in Ossining at the very time of the prison break would itself prompt questioning by the police. A further factor, if known to the police at the time—as it well may have been, would have been Wade's record of five arrests even though he had never been convicted. But after Riordan and McGale had been brought back to Ossining and when it shortly became apparent that Wade insisted on his original story and would not voluntarily disclose more, the requirements of the New York Criminal Code came into play and it cannot be said that delay beyond that point was necessary. Of course, when shortly after 5:30 A. M. the Ossining police found the stolen Plymouth underneath the railroad ramp an exploration of that subject by the questioning of Wade and Kiernan was entirely proper, especially as Lieutenant Mead had seen two men at 2:08 A. M. near the place where the Plymouth was later discovered. As stated above, at the trial Lieutenant Mead identified the two men as being Wade and Kiernan. Obviously what is necessary and proper depends upon the circumstances of each case with its special requirements and emergencies. We have held that a period of 9 hours between detention and arraignment was sufficient indication of possible coercion, along with other factors, to require a hearing. *United States ex rel. Alvarez* v. *Murphy*, 246 F. 2d 871 (2 Cir. 1957).

Appendix A.

Judge Foley in his opinion denying the first petition surmised that the reason for the delay in arraignment was to facilitate the capture of the other conspirators. 144 Fed. Supp. 458 at 461. But Riordan and McGale were captured at 8 A. M. and were back in Ossining shortly afterwards. Riordan made his statement to the District Attorney at 11:22 A. M. and McGale followed at 12:21 P. M. and 3:50 P. M. and their arraignment took place at 7 P. M. Moreover, the abundant manpower available from the District Attorney and members of his staff, the Ossining police department and more than a dozen officers and troopers of the state police made it possible to go forward simultaneously with the questioning of all of the prisoners as well as the pursuit of the investigation generallly.

Thus it is clear that the time consumed in capturing and questioning Riordan and McGale at most accounts for only a small fraction of the time during which Wade was detained and it is insufficient to support the contention that the 23 hour delay was necessary. State Police Inspector Nugent admitted that part of the reason why Wade was not arraigned with Riordan and McGale was that he had not made a statement by that time.

On the most favorable view of the evidence from the standpoint of the state it must still be said that on the admitted facts the circumstantial evidence to support the contention that Wade's statements were involuntary is so strong and the explanation of the state is so weak and inconclusive that we have no choice but to conclude that the statements were involuntary.

It was impossible for Wade to call any witnesses other than those who had a strong interest and a fraternal com-

pulsion to deny the allegations or to claim that they did not know what happened. When law enforcement officials create a situation where those in their custody have no means of communicating with the outside world and no way of calling their plight to the attention of any disinterested persons for as long as 23 hours, common sense requires that we conclude that the observance of the constitutional rights of their prisoners was secondary to obtaining incriminating statements from those so isolated. Such methods are inherently coercive. *Watts* v. *Indiana*, *supra* at p. 57; *United States ex rel. Caminito* v. *Murphy*, *supra*, and the cases cited therein.

When in addition the ordinary essentials of life are denied to the prisoners by refusal of sleep and food and sufficient drink there can be little doubt that the resulting confession is involuntary. Here the record even goes beyond that. The uncontradicted reports and testimony of three doctors tend to show that Wade bore marks on his body which were consistent with his claim that he was beaten during his 23 hour restraint.

Therefore we conclude that this record supports beyond any doubt Wade's claim that his confession was involuntary. The confession should not have been admitted against Wade; its admission in evidence was in violation of due process of law.

We must next inquire whether there was enough other evidence, apart from the confession, to support Wade's conviction. The Supreme Court in *Stein* v. *New York*, *supra*, after holding that the jury could have found the confessions involuntary, in the absence of impeachment by conceded

facts, went on to inquire whether there was enough evidence to support a verdict of guilty apart from the confessions. Mr. Justice Jackson pointed out at pages 188 to 194 of 346 U. S. that there was sufficient evidence to support the convictions of Stein and Cooper apart from the confessions. This other evidence consisted of "direct testimony of the surviving victim, Waterbury, and the well-corroborated accomplice, Dorfman, as well as incriminating circumstances unexplained." Thus the affirmance of the convictions in *Stein* rests on two grounds.

In Wade's case not only was the confession involuntary, but an examination of the record shows that without his confession the evidence was wholly insufficient to support his conviction.[12]

Here there is no independent evidence of any kind that Wade did anything to further the prison escape and as the indictment related solely to the murder of the prison guard Hartye, committed in the course of the felonious escape, the state's case against Wade could not have survived a motion to dismiss. The only evidence which connects Wade with the activities before the escape is his own coerced ad-

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[12] The trial judge did not charge the jury that if they found that the confession was involuntary they must acquit. Regarding the testimony other than the confession, he left it to the jury "to say whether or not the State established these facts to your satisfaction beyond a reasonable doubt, and * * * to say, assuming [they] reject the confessions, whether the State has established the complicity of Wade and Kiernan by evidence aside from the confessions." Record, pages 2441-2.

The record fails to show what requests were made by Wade's counsel prior to the charge. The judge merely stated that Wade's counsel argued that there was no evidence against Wade except the confession, and that Wade must be acquitted if the confession was rejected.

mission that he followed the milk truck on two occasions for the purpose of determining how the guns could be secretly attached to the truck in order to take the guns through the prison gates to the convict conspirators. That there is no admissible testimony to support this last minute admission, which was absolutely essential to the prosecution of Wade for felony murder, is striking testimony to the evils which are inherent in all coercive methods.

Apart from the confession the other evidence against Wade was: (1) Wade knew Riordan and Waters, and he had known Kiernan for twenty years. Wade admitted this in his testimony at the trial. (2) Wade's presence in Ossining together with Kiernan at the time of the jail break. (3) Lieutenant Mead of the Ossining police, while driving in a police car, saw two men at 2:08 A. M. walk 25 feet near where the stolen Plymouth containing a machine gun and ammunition was later found parked under the railroad ramp. At the trial Mead identified Wade and Kiernan as the two men. (4) Wade's improbable story as to how he drove to Ossining, and why he was without means to return to New York except by taxi.

While this evidence adds up to a suspicion that Wade knew more than he admitted and the speculation that he may have been on hand to help the three convicts and Kiernan after the escape had been effected, in our opinion it falls far short of being enough to take the case to the jury on a charge of felony murder by aiding and abetting the escape.

It follows that Wade's conviction was in violation of due process as it resulted from the use of an involuntary confession without which he could not have been convicted.

Appendix B.

We express to Henry C. Roemer, Jr., and Philip C. Potter, Jr., counsel assigned to represent Wade on this appeal and in matters preliminary thereto, our appreciation for their services which have been performed in accordance with the best traditions of the bar.

The order of the District Court denying Wade's first petition is reversed with the direction to issue the writ of habeas corpus forthwith. The appeal from the denial of the second petition is dismissed.

APPENDIX B.

UNITED STATES *ex rel.* WILLIAM WADE,
Relator,

v.

J. VERNAL JACKSON, as Warden of Clinton Prison, State of New York,
Respondent.

Civ. No. 6192.
United States District Court
N. D. New York.
Sept. 26, 1956.

Petition for writ of habeas corpus to test the validity of conviction and sentence in state court for felony murder. The District Court, Foley, J., held that conviction, affirmed by highest court of state could not be disturbed on ground

that admission of confession in evidence resulted in a denial of due process of law, in view of conflicting evidence and inferences as to whether confession was voluntarily made or was obtained by violence and threats.

Petition denied and certificate of probable cause granted.

William Wade, petitioner *pro se.*

Jacob K. Javits, Atty. Gen. of New York, Raymond B. Madden, Asst. Atty. Gen., of counsel, Joseph F. Gagliardi, Dist. Atty., Westchester County, White Plains, N. Y., Warren J. Schneider, Asst. Dist. Atty., New York City, of counsel, for appellee.

FOLEY, *District Judge.*

This petition for a writ of habeas corpus presents the same troublesome problem that was before me in United States *ex rel.* Caminito v. Murphy, D. C., 127 F. Supp. 689, reversed 2 Cir., 222 F. 2d 698, certiorari denied 350 U. S. 896, 76 S. Ct. 155. The discomfort expressed in my decision in that matter, insofar as this application again entails the review of decisions made by the Court of Appeals of New York, remains the same and my feeling of respect for and deference to the competence of that great court has not lessened. However, the duty to review is still present as previously recognized.

Terror filled the early morning hours and day of April 14, 1941, in the City of Ossining, New York. The security of the famed prison with the peculiar name, Sing Sing, had been violated by the attempted escape of three desperate inmates. The convicts had killed an unarmed guard inside the prison during the escape, and when outside the prison killed an Ossining policeman in the public street ad-

jacent to the railroad station in a gun battle. During this episode Waters, one of the convicts, was either killed or committed suicide, and Riordan and McGale, the other two, were apprehended in the woods across the Hudson River a few hours later. Wade, the petitioner here, was arrested in the City of Ossining when he and one Kiernan were entering a taxicab during or shortly after these violent episodes related above.

Wade, the petitioner, and Riordan, McGale and Kiernan were indicted jointly for the murder of the prison guard, Hartye. As an imposing answer to the inordinate delay which surrounds most criminal prosecutions, the trial of the four commenced on May 26, 1941, and concluded on June 27, 1941. The four defendants were found guilty of felony murder. The petitioner and Kiernan received from the jury the grace of a recommendation of life imprisonment in accordance with New York law and the presiding judge, although not so bound, sentenced them to such life imprisonment. Riordan and McGale were sentenced to death. After direct statutory appeals to the Court of Appeals were decided adversely to them and the judgments of conviction affirmed, both were executed.

These convictions have run the gamut of ordinary appellate review, particularly so the judgment of conviction in respect to the petitioner Wade. By memorandum-decision the Riordan and McGale convictions were affirmed by the Court of Appeals, New York, without opinion. People v. Riordan, 288 N. Y. 544, 42 N. E. 2d 12. Wade's conviction was affirmed unanimously with no opinion by the Appellate Division, Second Department, New York, in a memorandum-decision citing only the above previous decision of

the Court of Appeals in 288 N. Y. 544, 42 N. E. 2d 12. People v. Wade, 265 App. Div. 867, 38 N. Y. S. 2d 369. Upon a permissive appeal to the Court of Appeals, Wade's conviction was unanimously affirmed without opinion. People v. Wade, 291 N. Y. 574, 50 N. E. 2d 660. Reargument was denied in that court. People v. Wade, 292 N. Y. 577, 54 N. E. 2d 693. A petition by Wade for a writ of certiorari was denied by the United States Supreme Court, Wade v. People of State of New York, 320 U. S. 789, 64 S. Ct. 200, 88 L. Ed. 475, and rehearing denied, 320 U. S. 815, 64 S. Ct. 426, 88 L. Ed. 492. This statement of judicial review would seem to put most problems at rest, but recent authority clearly establishes the right of the petitioner to revive his contentions of the distant past and thus necessitate a recanvass of the whole situation by this District Court. United States *ex rel.* Caminito v. Murphy, *supra;* Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948. My complaint to such applications is not and never will be that they are time-consuming, because any judge worth his salt can always find the time to read and consider them no matter how crudely presented, and correct manifest injustice and obvious deprivation of important constitutional rights. There is always the fear that one individual, particularly the indigent, may be the victim of an unfair prosecution without the benefit of careful and competent appellate review of his case. But the fear diminishes, at least for me, when it is apparent that a full dress review has been given the matter by the Court of Appeals of New York, long distinguished in the judicature of this country. Although it does not appear in this record the custom in New York is for the Governor to hold clemency hearings where defendants are condemned to death. Thus, in all

probability, the record in the Riordan-McGale appeal, which was used in the Wade appeal upon the application of his attorneys, was reviewed again in this most distressing and soul-searching task of the Governor and his counsel as the final authority for commutation.

Upon the filing of the handwritten petition by Wade, I followed the same procedure as in the Caminito case with which no fault was found by the Court of Appeals, Second Circuit. An Order to Show Cause was directed to the Attorney General of New York and the District Attorney of Westchester County. Affidavits in opposition have been supplied by both, and the District Attorney has filed the same voluminous record that was reviewed by the Court of Appeals in 1942. He has also furnished copies of the printed briefs that were submitted to the Court of Appeals and the petition for certiorari and the brief in opposition filed in the United States Supreme Court. I shall make these papers part of this record because they marshal the facts and inferences therefrom, particularly in reference to extortion of confession from Wade by violence and threat, in clear, intelligent and vigorous fashion for the respective sides of the controversy. The Attorney General and the District Attorney argue earnestly that there has not been a complete exhaustion of state remedies, but it would seem that the Caminito and Leyra authorities previously cited indicate that the matter is at a stage where federal intervention by habeas corpus is proper. The motion filed by Wade in 1955 for writ of error *coram nobis* in the County Court of Westchester County involves the contention by Wade that a witness was possibly restrained from testifying in his behalf. Such application did not present the issue of forced confession in violation of the Fourteenth Amend-

ment. Accordingly, I shall base my decision upon the record furnished primarily because there is no indication that a hearing would bring forth anything more on the issue than was fully presented in the trial court in 1941. United States *ex rel.* Salemi v. Denno, 2 Cir. 235 F. 2d 910. See also Cranor v. Gonzales, 9 Cir., 226 F. 2d 83.

The record has been a long one to read but I have read it from cover to cover. It was not burdensome because it relates one of the most fascinating and intriguing stories in the annals of crime. It is reality that has every element of tense drama. It is a startling example of the skillful and ruthless scheming of the professional criminal against society and law enforcement officials. It gives warm assurance to know that such officials are just as skillful, courageous and competent in meeting such awesome threat.

Because it is the main and substantial contention of Wade that his confession was extorted by extreme violence and threat, I have concentrated on the testimony in the record in that respect as far as Wade is concerned. As stated previously, the salient facts for both sides on this question are best summarized and expressed in the briefs filed in the Court of Appeals. This same issue permeated the entire trial as far as all the defendants were concerned.

Wade was represented by experienced criminal counsel. The presentation of force, violence and threat to his person during his custody and interrogation could not have been more fully developed. The issue was met head-on by a most able District Attorney with the utmost candor and competence. His interrogation of the four defendants at the barracks resulted in the question and answer confessions admitted at the trial. These confessions were extracted

with clarity and detail at a time when great strain must have been present because of the lack of knowledge as to how many conspirators were involved and whether or not there was still a menace to the security of the prison and the community. As stated by Mr. Justice Jackson in Stein v. People of State of New York, 346 U. S. 156, 168, 73 S. Ct. 1077, 1084, 97 L. Ed. 1522, each of the confessions "could have been fabricated only by a person gifted with extraordinarily creative imagination."

I am not naive enough to think that the troopers held a tea party for the defendants during that early morning and day of interrogation at the Hawthorne barracks, nor would I be much convinced that Wade could have used the telephone to call his lawyer during this period of confinement prior to his arraignment. However, the gruesome story of abuse and violence told by Wade was denied completely by the principals involved. Food and drink were offered and the testimony is that Wade had a glass of milk. There was not any challenge by the prosecution that Wade did not have any sleep that night, but I do not suppose that many people did, including the police and troopers, during this period in the vicinity of Ossining. The delay in the arraignment of Wade is not denied at all, but some justification is present because two defendants had to be captured, four had to be questioned to fit the pieces together and insure public safety from other confederates. The bruises on the body of Wade became a dispute in the medical testimony and again, as in all factual disputes, inferences could be drawn either way. The explanation for the removal of the defendants to the barracks seems plausible under the circumstances.

Appendix B.

In my judgment, the trial of these four defendants contained all the contradictions of evidence and inference that could be developed on this crucial issue. The trial judge was painstaking in all his efforts and allowed the most thorough presentation and cross-examination to the defense. The jurors gave many hours of deliberation and several times returned with questions to the court. The record demonstrates to me the permissible resolution in favor of the People of contradictions in evidence or conflicting inferences. Stein v. People of State of New York, 346 U. S. 156, 182, 73 S. Ct. 1077, 97 L. Ed. 1522. It is impossible for me to tip over this jury verdict and judgment of conviction that has been reviewed by five judges of the Appellate Division of New York, seven judges of the Court of Appeals of New York, and certiorari denied by unanimous vote of the United States Supreme Court when the matter was a current one. Further, despite the caution of Mr. Justice Frankfurter in his dissenting opinion in the Stein case, 346 U. S. at page 200, 73 S. Ct. at page 1100, that the determination (forced confession) must not be influenced by an irrelevant feeling of certitude that the accused is guilty, there is always better support in the human mind to decide conflicting inferences adverse to a defendant when evidence of guilt is quite probable and reasonable. The admissions of Wade that were extracted by the District Attorney during his voluntary appearance on the stand in the preliminary examination on the admissibility of the confession were most damaging to his cause. The explanation of his presence in Ossining at the exact planned time of the break in the presence of Kiernan who was deeply involved is incredible and has no support from any other evidence. I do not have the feeling of hesitation and

suspicion that I had in the Caminito case. Circumstantial and corroborative evidence was strong against Wade.

The Order to Show Cause is dismissed and the petition for habeas corpus is denied. The papers shall be filed without the usual requirement for the prepayment of fees. Inasmuch as the problem presented is one close in principle to the legal contentions made in the Caminito and Leyra cases, although not close in fact, in my judgment, I hereby grant a certificate of probable cause to enable the petitioner to review this decision in the Court of Appeals, Second Circuit, if he be so advised.

It is so ordered.

APPENDIX C.

EXCERPTS FROM THE POINT HEADINGS AND BOLD FACE MATERIAL IN WADE'S BRIEF IN NEW YORK COURT OF APPEALS.

"POINT I

The Trial Court should have rejected the alleged confession in the first instance as a matter of law.

The Beatings and Threats

William Wade was apprehended by Officer Kelly at about 2:30 A. M. on April 14th, 1941. He was arrested and booked at police headquarters at 3:00 A. M. No particular charge was preferred against him, * * *.

His pedigree was taken, he was finger-printed and placed in a cell (f. 3016). About fifteen minutes later, State Troop-

ers arrived, and after interrogating him, they beat him to the floor and pulled him up again to his feet by his hair (f. 3017). When he denied any knowledge of a jail break, three of the troopers took him to the back of the building and 'cuffed him around, around the chest, stomach and kicking me' (f. 3018). * * *

* * *

The District Attorney then ordered Wade moved out of the City of Ossining to the Barracks of the State Troopers at Hawthorne, N. Y. (f. 7157). The time was shortly before 11:00 A. M.

From then on a veritable inquisition followed. He was taken into a dark room at the barracks, and surrounded by six husky State Troopers, ordered to disrobe. While being fingerprinted, and in the nude, one of these troopers kept jumping on his bare feet (f. 3023).

During his stay in this dark room for several hours, Wade was constantly questioned in an attempt to force him to admit participation in the jail break.

* * *

By this time Wade's foot was swollen and he was limping. **A rope was swung over a beam in the stable roof, and then tied around Wade's neck to hold him up,** as he was constantly falling to the ground because of the terrific beatings he was receiving. His hands were handcuffed behind his back. **While strung up by this rope which was choking him, his body was being punched and mauled. The handcuffs were tightened to torture him by means of turning a stick placed through the handcuffs. He was lifted from the ground, by the rope around his neck leaving only his toes**

touching. He was punched and kicked while in this position, until

> **'I finally collapsed; I was laid on the floor and I woke up getting dragged up again.'**

While all this was going on, he was still being asked about the prison break and he steadfastly denied knowing anything about it (ff. 3036-3040).

• • •

This ordeal continued uninterruptedly for eighteen hours. Not a morsel of food or drink was given him (f. 3042). He was weak and exhausted, unable to stand up under this punishment any longer (f. 3044), and remembering Sergeant Bill's threat to keep it up for 30 days longer (f. 3040), Wade consented to talk to the District Attorney and 'say anything you want me' (f. 3041).

• • •

Corroboration of the Beatings and Threats

This same stenographer, George H. Gordon, corroborates Wade with respect to the latter's physical condition. He testified Wade looked tired (f. 2929) and that he was unable to speak clearly (f. 2919). Wade lacked the power or strength to make himself heard by the stenographer, thus making it necessary to move him right alongside the stenographer (ff. 2906, 2930, 2936). • • •

• • •

Are we not therefore justified in concluding that the failure of the District Attorney to produce the suit as he had promised was due to the fact that the evidence was damaging to the People's case and that its appearance would have corroborated Wade's testimony of the brutal beatings?

And should there be need for any additional corroboration, we respectfully submit that the 24 hour delay in arraigning the defendant is not only corroborative, but actually conclusive proof of the police brutality.

• • •

In the case at bar no excuse or justification has even been attempted to explain the delay in arraignment. Inspector Nugent admitted that Wade WAS NOT ARRAIGNED, NOT EVEN AT THE SAME TIME AS THE OTHER DEFENDANTS WERE, BECAUSE HE HAD NOT YET MADE A STATEMENT OR CONFESSION (ff. 3883, 3886). AND IT IS SIGNIFICANT TO NOTE THAT HE WAS FINALLY ARRAIGNED ONE-HALF HOUR AFTER MAKING THIS ALLEGED CONFESSION (f. 5959). • • •

• • •

THERE IS NO EVIDENCE IN THE ENTIRE RECORD, INDEPENDENT OF THIS ALLEGED CONFESSION, WHICH WOULD IN ANY WAY, SHAPE OR MANNER IMPLICATE WADE IN THE COMMISSION OF ANY CRIME. THE ADDITIONAL PROOF REQUIRED BY SEC. 395 OF THE CODE OF CRIMINAL PROCEDURE IS LACKING. • • •"

• • •

Appendix C.

"POINT II

Wade was deprived of his constitutional rights.

We believe that this Court has not yet defined the limits to which a District Attorney may go in cross-examining a defendant, *where the defendant takes the witness stand for a special or limited purpose*, and not as a witness in his own behalf or defense."

• • •

"POINT III

The Court should have directed an acquittal of Wade."

• • •

"POINT IV

The conduct of the District Attorney was highly prejudicial to the defendant Wade."

• • •

"POINT V

The verdict of the jury was against the weight of the credible evidence.

We repeat if we may, that the alleged confession should have been ruled out as a matter of law. Were we even to accept same for the purpose of this argument, *the evidence against Wade was still insufficient to find him guilty beyond a reasonable doubt.* THERE WAS A TOTAL ABSENCE OF THE

Appendix C.

ADDITIONAL PROOF THAT IS REQUIRED BY SECTION 395 OF THE CODE OF CRIMINAL PROCEDURE."

• • •

"POINT VI

The lower Court erred in following the decision in People v. Riordan."